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KHOO TENG CHYE v. CEKAL BERJASA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
ABDUL RAHMAN SEBLI JCA
B [CIVIL APPEAL NO: P-02-542-03-2013]
21 MAY 2015

TORT: *Conspiracy to injure – Elements of – Conduct of parties – Whether defendants conspired against plaintiff – Whether caused loss to plaintiff by way of*
C *deceit – Whether plaintiff suffered loss*

The appellant/plaintiff obtained a judgment against the first respondent/first defendant. On the first respondent's failure to pay the judgment sum, the appellant served a statutory notice under s. 218(1)(e) of the Companies Act 1965 to the first respondent. However, the first respondent, through its
D solicitors (third defendant), induced the appellant to withhold the enforcement of the judgment. The appellant alleged that it was subsequently discovered that the first respondent had transferred two plots of its land to the second respondent/second defendant and the appellant had thus suffered loss as the land, which ought to be a part of the assets of the first respondent
E available to the creditors of the first respondent including the appellant, were no longer available. The appellant alleged that a common director of the first and second respondents, Amir Hussain, had played a major role to deprive the appellant of its right to recover the judgment sum or part thereof against the first respondent. Amir Hussain and the second respondent had benefitted
F out of the land transaction to the detriment of the appellant. The appellant's claim against the respondents, based on the tort of 'conspiracy to injure', was dismissed by the High Court and hence, the appeal.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

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(1) Liability in tort may arise when there is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for its interference. In the absence of an express admission of conspiracy, an agreement to injure has to be established by circumstantial evidence. (paras 8 & 9)

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(2) A judgment debtor, whether solvent or insolvent, can dispose of the judgment debtor's assets to *bona fide* purchaser if there is no restriction in law. A creditor cannot complain that the disposal has affected his rights *per se*. However, when such disposal is done to attract a complaint
I of conspiracy as well as tort of 'conspiracy to injure', the court is obliged to grant the relief based on established legal principles. (para 14)

(3) The conduct and evidence herein clearly showed that Amir Hussain, the first and second respondents and/or their agents had induced the appellant to delay the winding-up proceedings and in that crucial time, had transferred the landed assets of the first respondent to the second respondent, thereby preventing the appellant from proceeding with the winding-up proceedings. The first and second respondents with their agents and/or Amir Hussain took active steps to delay the appellant from proceeding with the winding-up proceeding to create a wrongful loss as well as detriment to the appellant. (para 13)

(4) The conduct of the respondents through Amir Hussain as well as the common solicitor, by conduct as well as correspondence, would attract s. 10 of the Evidence Act 1950 and elements of tort of 'conspiracy to injure'. The trial judge had failed to consider the section and its relevance to the facts of the case and therefore, the integrity of the decision making process had been compromised. (paras 7 & 13)

(5) As to the issue of quantum of damages, taking into consideration that the second respondent did not oppose the action by giving evidence or both respondents did not deal with the issue of quantum or oppose the quantum in the submission in the High Court, the judgment sum of RM4,344,571 with interest was an appropriate order on the facts and rules of pleadings and procedure. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/plaintif memperoleh penghakiman terhadap responden pertama/defendan pertama. Atas kegagalan responden pertama membayar jumlah penghakiman, perayu menyerahkan notis statutori di bawah s. 218(1)(e) Akta Syarikat 1965 kepada responden pertama. Walau bagaimanapun, responden pertama, melalui peguamcaranya (defendan ketiga), mendorong perayu untuk menangguhkan penguatkuasaan penghakiman tersebut. Perayu mendakwa bahawa responden pertama kemudiannya didapati telah memindahkan dua plot tanahnya kepada responden kedua/defendan kedua dan perayu oleh itu mengalami kerugian kerana tanah tersebut, yang sepatutnya membentuk sebahagian aset responden pertama yang sedia ada untuk pemiutang-pemiutang responden pertama termasuk perayu, kini tiada lagi. Perayu mendakwa bahawa seorang pengarah bersama bagi responden pertama dan kedua, Amir Hussain, telah memainkan peranan yang besar untuk menafikan perayu haknya untuk mendapatkan semula jumlah penghakiman atau sebahagiannya terhadap responden pertama. Amir Hussain dan responden kedua telah mendapat faedah daripada transaksi tanah tersebut sehingga merugikan perayu. Tuntutan perayu terhadap responden-responden berasaskan tort 'persubahatan untuk mengancam' ditolak oleh Mahkamah Tinggi, dan dengan itu, rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Liabiliti dalam tort berbangkit apabila terdapat pencabulan hak undang-undang untuk campur tangan dalam hubungan kontrak yang diiktiraf oleh undang-undang jika tiada justifikasi yang mencukupi bagi campur tangan tersebut. Tanpa pengakuan jelas bagi persubahatan, suatu perjanjian untuk mengakibatkan kerugian perlu dibuktikan melalui keterangan ikut keadaan.

(2) Penghutang penghakiman, sama ada mampu membayar hutang atau muflis, boleh melupuskan aset-aset penghutang penghakiman kepada pembeli *bona fide* jika tidak ada sekatan dari segi undang-undang. Seseorang pemiutang tidak boleh mengadu bahawa pelupusan telah menjejaskan haknya *per se*. Walau bagaimanapun, apabila pelupusan tersebut dilakukan untuk menarik aduan persubahatan dan juga tort 'persubahatan untuk mengancam', mahkamah wajib membenarkan relif tersebut berdasarkan prinsip undang-undang yang matan.

(3) Tindakan dan keterangan di sini jelas menunjukkan bahawa Amir Hussain, responden pertama dan kedua dan/atau ejen-ejen mereka telah mendorong perayu untuk melengahkan prosiding penggulungan dan dalam masa yang penting tersebut, telah memindahkan aset-aset harta tanah responden pertama kepada responden kedua, dengan itu menghalang perayu daripada meneruskan dengan prosiding penggulungan. Responden pertama dan kedua dengan ejen mereka dan/atau Amir Hussain telah mengambil langkah-langkah yang aktif untuk melengahkan perayu daripada meneruskan dengan prosiding penggulungan untuk membentuk kerugian secara salah dan juga kemudaratan kepada perayu.

(4) Tindakan responden-responden melalui Amir Hussain dan juga sebagai peguamcara bersama bagi tindakan dan juga surat-menyurat akan menarik penggunaan s. 10 Akta Keterangan 1950 dan elemen-elemen tort 'persubahatan untuk mengancam'. Hakim bicara telah gagal mempertimbangkan seksyen tersebut dan kaitannya kepada fakta kes dan oleh itu, integriti proses membuat keputusan telah terjejas.

(5) Berkaitan isu kuantum kerugian, mempertimbangkan bahawa responden kedua tidak membantah tindakan tersebut dengan memberikan keterangan atau kedua-dua reponden tidak menguruskan isu kuantum atau membantah kuantum dalam penghujahan di Mahkamah Tinggi, jumlah penghakiman sebanyak RM4,344,571 dengan faedah adalah perintah yang wajar di atas fakta dan kaedah-kaedah pliding dan prosedur.

Case(s) referred to:
Datuk M Kayveas v. Chong Chek Ah & Ors [2011] 1 LNS 380 HC ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Lonrho Ltd v. Shell Petroleum Co Ltd (No 2) [1982] AC 173 ***(refd)***
Quinn v. Leathem [1901] UKHL 2 ***(refd)***
R Balakrishnan Pillai v. State [1996] Cri LJ 757 ***(refd)***
State of Tamil Nadu v. Nalini AIR 1999 SC 2640 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 10

Other source(s) referred to:
Bullen & Leake & Jacob's: Precedents of Pleadings, 13th edn, pp 220-221
Janab's Key to Law of Evidence, 3rd edn, p 280
Ramaswamy Iyer, *The Law of Torts,* 10th edn, p 515
Ratanlal & Dhirajlal, *The Law of Torts,* 21st edn, pp 283 & 284

For the appellant - Gopal Sri Ram (Lim Choon Khim, Chuah Yih Chuan & Yii Hee Keat with him); M/s Chooi, Saw & Lim
For the 1st respondent - Tan Lan Eing (Choo Jun Lin with her); M/s Tan Chuah Shuaib & Co
For the 2nd respondent - Chan Kean Li (Lim Poh Leong, Yap Kok Kheong & Ong Bee Khoon with him); M/s Gibb & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-638-2008]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/plaintiff appeals against the decision of the High Court Judge for dismissing its claim based on the tort of 'conspiracy to injure' against the first and second respondents/defendants jointly, and severally came up for hearing on 30 March 2015. Upon hearing we reserved judgment. My learned sister, Badariah binti Sahamid JCA and learned brother, Abdul Rahman bin Sebli JCA have read the draft judgment and approved the same. This is our judgment.

Preliminary

[2] Before we set out the brief facts of the case it must be noted that:

(i) the learned counsel for the second respondent had submitted no case to answer at the High Court and no evidence was led on behalf of the second respondent. Such a conduct is fatal to the second respondents' case and gives the appellant procedural advantage to anchor the cause of action as well as to give probative force to his evidence. Support for the proposition is found in a number of cases. Hamid Sultan Abu

Backer J (as he then was) had dealt with it in great detail in the case of *Datuk M. Kayveas v. Chong Chek Ah & Ors* [2011] 1 LNS 380; [2011] 9 MLJ 347 and we do not intend to repeat the same here. The said judgment had been affirmed by the Federal Court. (See *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949).

(ii) there was one common director by the name of Amir Hussain (DW1) and/or representative of the first and second respondent acting on behalf of the second respondent who had played a major role to deprive the appellant of its right to recover the judgment sum or part thereof against the first respondent by way of winding up proceedings. Amir Hussain and the second respondent benefited out of the land transaction of the first respondent herein, to the detriment of the appellant. The first appellant's land was transferred to the second respondent.

(iii) the first and second respondents including its common solicitor who was cited as the third defendant (against whom the appellant has withdrawn the action) were instrumental in defeating the appellant's right to recover the judgment sum or part thereof by way of winding up proceedings.

(iv) the learned trial judge had accepted the evidence of the appellant that it did not enforce the judgment expeditiously because of the first respondent's representation that it will be settled and that the appellant had been induced to withhold the enforcement of the said judgment. The learned counsel for the appellant reproduces the relevant part of the judgment as follows:

> 60. Essentially the oral evidence of the plaintiff is the same as the factual background of the case narrated above. Additionally, he said when Mr. Loh Eng Wee approached him for the second time for the settlement of the said judgment, he came together with Mr. Khoo Boo Tee. He said, although Mr. Khoo Boo Tee was then no longer on record the director of the first defendant due to his bankruptcy status, but he who was still involved in the affairs of the first defendant company had urged him to withhold all execution proceedings as financially insolvent first defendant was in the midst of seeking assistance from the third party to revive the development project to which he agreed. He further said that he was aware of the first defendant being presented with a winding up petition by Public Bank Bhd in 2007.
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> …
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> 86. On this point of submission considering the covering letter of the service of the said judgment dated 21 May 2001 (at para 82(2) above) which was not at all challenged, I am inclined to think that the first plaintiff was aware and had the knowledge

> about the said judgment against it. Consequently, despite the non-calling of the two representatives of the first defendant as witnesses by the plaintiff, I believe such representation as alleged by the plaintiff did actually take place …

(v) contrary to the above finding and failing to take cognizance of the fact that the appellant's claim itself is anchored on the tort of conspiracy to injure, the learned trial judge in dismissing the appellant's claim said that the appellant was guilty of delay in enforcing the judgment. That part of the judgment reads as follows:

> 90. Notwithstanding my above state view about the said principle of tortfeasor, on the admission of the plaintiff himself that the said judgment had nothing to do with the said lands, and the letter of exh. P8, would not stop him from enforcing the said judgment, I have come to the conclusion that the plaintiff is actually the author of his own deed and non of the defendant can be faulted for his own delay in enforcing the said judgment. The plaintiff has therefore on the balance of probabilities failed to prove his case.

(vi) the complaint of the appellant in this case is that: (i) He was a judgment creditor of the first defendant; (ii) the first defendant had charged the lands to MBSB; (iii) the lands were redeemed and transferred to the second respondent; (iv) the land will not be transferred to the second respondent if the respondents had not induced the appellant to withhold its winding up proceedings against the first respondent; (v) because of the inducement the appellant had suffered loss and damage as the only valuable property of the first defendant has been transferred to the second respondents.

(vii) during the hearing of the appeal, the learned counsel for the appellant had informed the court that they are limiting the claim to the tort of 'conspiracy to injure' and seeking damages to the amount of the judgment sum with interest and costs jointly and severally to be paid by the respondents in this appeal.

(viii) the respondents did not take issue of the quantum claimed as damages for the tort of conspiracy in the High Court as well as in the submission in the Court of Appeal. The respondents' position is that the element for the tort has not been established to entitle the appellant to damages.

(ix) the first respondent is an insolvent company even before the appellant had secured the judgment against the first respondent.

(x) the first respondent's lands were charged and it owed MBSB more than RM150 million. It was Amir Hussain who was instrumental in redeeming the said property for about RM30 million. How it was done

A is another matter when there is a valuation report which is unchallenged that the charged property was valued at RM47,090,000 at that material time. Amir's conduct of redeeming the property and transferring it to the second respondent and subsequently was said to have made a profit from the transaction shows a pattern of conduct B lacking *bona fide* in relation to the conduct of the first to third defendants and the appellant.

[3] The facts of the case are well articulated in the statement of claim. Much judicial time will be saved if relevant parts are repeated:

C (5) The plaintiff had on 10.05.2001 obtained Judgment against the First Defendant through Civil Suit Number 22-507-2000, whereby a copy of the Judgment together with a Bill of Cost was served on the First Defendant through the Plaintiff's solicitors' letter dated 21.05.2001.

(6) On the First Defendant's failure to pay the judgment sum, the Plaintiff served on to the First Defendant a Statutory Notice dated D 24.10.2007 pursuant to Section 218(2)(a) of the Companies Act 1965. The Plaintiff through the Statutory Notice demanded that the First Defendant pay the judgment sum of RM4,344,571.00 within 3 weeks from receipt of the Statutory Notice and informing the First Defendant that if the First Defendant failed to settle the debt within three (3) weeks, further action will be taken to wind-up the E First Defendant on the grounds that the First Defendant was unable to pay its debts.

(7) The Third Defendants through their letters dated 31.10.2007 and 15.11.2007 informed the Plaintiff that they were acting on behalf of the First Defendants and that the First Defendants did not have F knowledge of the said Judgment entered against them on 21.05.2001. The Third Defendants also requested to be supplied with the cause papers relating to the said Judgment including the Writ of Summons and Statement of Claim and that the Third Defendants would duly reply after studying the Plaintiff's claims.

G (8) The Plaintiff forwarded to the Third Defendants the said Writ of Summons, Statement of Claim, Judgment and Bill of Cost through their solicitor's letter dated 16.11.2007.

(9) Thereafter the Third Defendants through their letter dated 23.11.2007 informed the Plaintiff's solicitors that the Managing Director of the First Defendants was overseas and the Third H Defendants will revert after the Managing Director returns on 12.12.2007.

(10) However, the Third Defendants did not revert, and after being given a reminder by the Plaintiff's solicitors, the Third Defendants through their letter dated 26.02.2008 stated that they did not receive I any instructions from the First Defendant.

(11) Thereafter, it came to the Plaintiff's knowledge that on 27.12.2007 the First Defendants had transferred to the Second Defendants two (2) plots of land owned by the First Defendant, in example, Lot No.

3254 and 3255, District 13, North-East District, Penang respectively held under Grant No. 57691 and District Grant No. 1753 (hereinafter known as 'the said Lands'). The transfer was purportedly made pursuant to a Sale and Purchase Agreement between the First Defendant and Second Defendant.

(12) The Plaintiff also found that the Third Defendant's representation that the First Defendant's Managing Director would be overseas until 12.12.2007 was not true.

(13) The Plaintiff also found the Third Defendants were acting as solicitors for the Second Defendant in the transfer and/or the Sale and Purchase Agreement for the said Lands from the First Defendant to Second Defendant.

(14) Therefore the First Defendant, Second Defendant and Third Defendants (or any two (2) of them) wrongfully and with intent to cause loss to the Plaintiff by deceit through unlawful means conspired against the Plaintiff and caused loss by deceit to the Plaintiff.

(15) In the alternative, the First Defendant, Second Defendant and Third Defendant (or any two (2) of them) conspired and combined against the Plaintiff jointly and wrongfully with the predominant intention of injuring the Plaintiff and/or causing loss to the Plaintiff by *deceit*.

(16) As a result of the said conspiracy, the Plaintiff has suffered loss as the said Lands which ought to be a part of the assets of the First Defendant available to the creditors of the First Defendant, including the Plaintiff, are no longer available to the creditors of the First Defendant, including the Plaintiff.

(17) As a result of the conspiracy in paragraph 14 and 15 above:

(a) The First Defendant, Second Defendant and Third Defendants are liable to pay damages to the Plaintiff;

(b) The Defendants hold the said Lands as constructive trustees for all of the creditors of the First Defendant, including the Plaintiff.

(18) Wherefore, the Plaintiff claims:

(i) Against the Second Defendant:

(a) a declaration that the said Lands identified as Lot No. 3254 and 3255, District 13, North-East District, Penang respectively held under Grant No. 3254 and District Grant No. 1753, are held by the Second Defendant as constructive trustees for the creditors of the First Defendant including the Plaintiff.

(b) further relief and order to give effect to the said declaration;

(c) injunction to stop the Second Defendant from transferring, charging or in any manner disposing the said Lands identified as Lot No. 3254 and 3255, District 13, North-East District, Penang respectively held under Grant No. 3254 and District Grant No. 1753;

(d) injunction to stop the Second Defendant from carrying out property development on the said Lands identified as Lot No. 3254 and 3255, District 13, North-East District, Penang respectively held under Grant No. 3254 and District Grant No. 1753;

(ii) against the First Defendant, Second Defendant and Third Defendants:

(a) damages for conspiracy;

(b) interest;

(c) cost.

Jurisprudence Relating To Conspiracy And The Tort Of Conspiracy To Injure

[4] *Oxford Advanced Learner's Dictionary* – 7th edn, defines conspiracy as 'a secret plan by a group of people to do something harmful or illegal'. To support criminal or civil liability, the Evidence Act 1950 (EA 1950) recognises the issue of conspiracy as relevant and admissible evidence based on a low threshold of 'reasonable ground to believe that two or more persons have conspired'. Once evidence is introduced as to the nexus of the parties involved in the subject matter of the dispute, the court is obliged to consider the facts and relevant circumstances to ascertain whether it was a genuine transaction or whether it has element of civil or criminal wrong.

[5] Section 10 of EA 1950 states:

> 10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of those persons, in reference to their common intention after the time when the intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

The ingredients of the section are set out in *Janab's Key to Law of Evidence*, 3rd edn (Revised by Dato' Mah Weng Kwai) at p. 280 as follows:

> The condition precedent for invoking section 10 is that there should be reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong. Further, two conditions must be satisfied that is the statement or act must be done after the common intention was first entertained by the conspirators and it must have reference to their common intention. If this condition is satisfied a wide variety of facts is made admissible under section 10.

The jurisprudence relating to 'conspiracy' is set out at pp. 276 and 277 as follows:

> Section 10 deals relevancy of facts in relation to actions for conspiracy. Conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means. It may be both a crime as well as tort. The principle on which section 10 is based is the theory of agency, which is based on the maxim, *'qui facit per alium facit per se'* ie, he who does by another does it himself. Each conspirator is the agent as well as the principal of the other conspirators. Statement made in the absence of one conspirator will be taken in evidence as an exception to '*res inter alios acta principle*', ie, transaction that happened between strangers are inadmissible.
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> Under the English law, when two or more persons conspire together to commit an offence or actionable wrong, everything said, done or written by anyone of them in execution or furtherance of their common purpose is deemed to be said, done or written by everyone.
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> Our section 10 differs from the English position. The English law requires that the statement or act should be said or done in furtherance or execution of the common purpose. However, under section 10 they must be in reference to the common intention, but need not be in support or in furtherance of the conspiracy. Section 10 appears to be wider in scope than the English law so that a statement made after the termination of the conspiracy is admissible. The Privy Council and the Supreme Court of India have held that notwithstanding the apparent difference in the language there is no significant difference between English Law and Indian Law on the subject. Our section 10 is in *pari materia* with section 10 of the Indian Evidence Act.
>
> Conspiracy is not always capable of proof by direct evidence. It is axiomatic that there must be proof and not mere conjecture. Conspiracy cannot be established by hearsay evidence. Once evidence in conspiracy charge has been admitted it does not mean that the court cannot re-evaluate its admissibility when the reasonable grounds are available to displace the evidence.

[6] The English position as well as the essential ingredients to make out a case of conspiracy is set out in *Bullen & Leake & Jacob's: Precedents of Pleadings* (13th edn.) at pp. 220-221 as follows:

> Conspiracy is the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. Historically, there are clearly two kinds of conspiracy to injure, one in which the acts which the conspirators conspire to carry out or the means involved are *per se* unlawful, for example, involve in the commission of a crime or tort (conspiracy A), and the other where the conspiracy does not involve the commission of any specific unlawful act, but is a conspiracy where the sole or predominate purpose is to injure another party (conspiracy B); and in the case of conspiracy B conduct which would not be tortuous if committed by an individual alone becomes tortuous by virtue of the combination with the

A necessary purpose … Lord Diplock, giving the decision in (*Lonrho v. Shell Petroleum* [1982] AC 173) is now understood to have decided that for even conspiracy A to be actionable the defendants' sole or predominant purpose needs to be shown to be injury to the plaintiffs (that is, as opposed to the forwarding of the interests of those who enter into the conspiracy) …

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[7] On the facts of the instant case, it is abundantly clear that the conduct of the first and second respondents through Amir Hussain as well as the common solicitor by conduct as well as correspondence clearly will attract s. 10 of the Evidence Act 1950. The learned trial judge had failed to consider the said section and its relevance to the facts of the case. In consequence, the integrity of the decision making process has been compromised.

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[8] The tort of conspiracy to injure was discussed *in extenso* by the House of Lords in *Quinn v. Leathem* [1901] UKHL 2 relating to a case of economic tort. Lord Macnaghten asserted that liability in tort may arise when there is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for its interference. In *Lonrho Ltd v. Shell Petroleum Co Ltd (No 2)* [1982] AC 173, Lord Diplock had this to say:

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> The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants' and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem* [1901] AC 495 and accepted as good law in the *Crofter* case [1942] AC 435.

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[9] It is also well settled that in the absence of an express admission of a conspiracy, an agreement to injure has to be established in the vast majority of cases by circumstantial evidence. In *State of Tamil Nadu v. Nalini* AIR 1999 SC 2640, the Indian Supreme Court on the facts had this to say:

> The agreement, *sine qua non* of conspiracy, may be proved either by direct evidence which is rarely available in such cases or it may be inferred from utterances, writings, acts, omissions and conduct of the parties to the conspiracy which is usually done. In view of Section 10 of the Evidence Act anything said, done or written by those who enlist their support to the object of conspiracy and those who join later or make their exit before completion of the object in furtherance of their common intention will be relevant facts to prove that each one of them can justifiably be treated as a conspirator.

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[10] In *R Balakrishnan Pillai v. State* [1996] Cri LJ 757, the Kerala High Court on the facts had this to say:

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> Conspiracy as a whole is brought about in secrecy and the proof of the same by adoption of evidence direct, is really an impossible feat in most of the cases, though in the rarest of rare occasion; the possibility of obtaining such evidence is there. As such the conspiracy may be proved in most of the cases, by process of inference or induction from relevant facts and circumstances.

[11] What is important to note from the cases such as *Quinn* and/or *Lonrho* is that the category of 'actionable wrong' are not closed and will stand as a developing subject to provide relief to persons who are wronged. It is also well established the tort of conspiracy can be in many forms. It will be triggered if justice is perverted and victim of the tort suffers damage. Learned authors of *Ramaswamy Iyer 'The Law of Torts*, 10th edn at p. 515, had this to say:

> In medieval English law, the action for conspiracy was the remedy for damage done by two or more people in conjunction with each other to pervert justice, and was ultimately superseded by the action for malicious prosecution. In the modern low of torts it is the remedy for damage done to a person by two or more persons acting in concert for the purpose of causing damage … The damage in this class of actions is usually loss of employment, business or trade, but may take any other form.

And at p. 516 say:

> **16.1.1. The Element of Conspiracy in Relation to other Independent Torts**
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> Before we proceed to discuss the element of conspiracy in the tort which bears its name, it may be useful to consider how it may be material to other independent torts. It may be material in the following ways:
>
> (a) It may be a circumstance of aggravation, eg, a concerted assault, libel or inducement to break a contract.
>
> (b) It may be evidence of the causal connection between the conduct of the wrongdoers and the resulting damage, as the pressure of numbers can often achieve what a single person cannot, eg, dismissal of a workman in breach of a contract of employment by an employer at the request and out of fear of a powerful trade union.
>
> (c) It may be evidence of malice or the absence of a proper motive or justification, eg, a conspiracy to hoot an actor when he appears on the stage.
>
> (d) It would prove the joint liability of two or more persons for the same tort.
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> In these cases, the element of conspiracy is collateral to or evidentiary of an independent tort, because even a single individual who does similar harm will be liable. The tort of conspiracy as now evolved by English decisions assumes that two or more persons acting in concert may become liable for conduct which on the part of a single individual alone is not actionable.

[12] As to the issue of quantum of damages, taking into consideration the second respondent did not oppose the action by giving evidence or both the respondents did not deal with the issue of quantum or oppose the quantum in the submission in the High Court, we take the view the judgment sum of

RM4,344,571 with interest at 5% per annum from the date of filing of the writ until the realisation of the judgment sum will be an appropriate order on the facts and rules of pleadings and procedure in the instant case.

[13] We have read the appeal record and the able submissions of the parties. After much consideration to the submissions of the learned counsel for the respondents, we are of the considered view the appeal must be allowed. Our reasons *inter alia* are as follows:

(1) It is not in dispute in the instant case:

(i) Amir Hussain was the witness for the first respondent only, notwithstanding that he was the director of the first respondent as well as the second respondent;

(ii) the second respondent took control of the first respondent;

(iii) Amir Hussain had signed the redemption agreement as director of the first respondent notwithstanding the document does not set out his name below the signature;

(iv) Amir Husain also has signed the sale and purchase agreement between the first and second respondent notwithstanding the document again does not set out his name below the signature;

(v) statutory notice for winding up was served on 24 October 2007;

(vi) on 31 October 2007 Amir Hussain as the Managing Director of the first respondent and a Director of the second respondent instructed the third defendant (action withdrawn) to respond to the statutory notice;

(vii) the requested papers were served on 16 November 2007 and on 23 November 2007 the appellant was informed that DW1 was overseas until 12 December 2007 and response to the appellant's statutory notice would only be made after his return;

(viii) the third defendant was the common solicitors and had completed the execution of transfer forms, Form 14A, etc. one day before DW1 was said to return from overseas. It was never established that DW1 was overseas.

(2) The conduct and evidence clearly shows that Amir Hussain, first and second respondents and/or their agents had induced the plaintiff to delay the winding up proceedings and in that crucial time complained of by the appellant had transferred the landed assets of the first respondent to the second respondent, thereby preventing the appellant from proceeding with the winding up proceedings. Proceeding thereafter by winding up proceeding will serve no meaningful purpose as the first respondent had transferred its only landed assets to the second

respondent. The first and second respondents with their agents and/or Amir Hussain took active steps to delay the appellant from proceeding with the winding up proceeding to create a wrongful loss as well as detriment to the appellant. The conduct of the respondents and Amir Hussain will attract s. 10 of the EA 1950 and elements of tort of 'Conspiracy to Injure'. Any reasonable tribunal appraised with the evidence will not find it difficult to rule that Amir Hussain was economic with the truth in his evidence and his conduct with other conspirators led to the loss and damage to the appellant.

(3) On the facts of the instant case, the learned trial judge arbitrarily dismissed the action on the grounds of delay in the enforcement of judgment, notwithstanding the learned judge had taken into consideration all the relevant facts as well as the reasons for the delay. In consequence, it has resulted in a perverse judgment. This is not a case where the appellant delayed in enforcing the judgment. It was the first respondent who had represented that the said judgment will be settled once the 'white knight' saves the defunct company or words to that effect. The 'white knight' came in the guise of the second respondent and Amir Hussain who had masterminded the scheme on the pretext of saving the company had enriched themselves. All creditors were said to have been paid except the appellant. When the appellant came to know that he has not been paid, the appellant issued the winding up notice even though six years had lapsed from the date of the judgment. The judgment in law is valid for 12 years under the Limitation Act 1953. However, any execution after the six years period may require the leave of the court depending on the mode of execution. In the instant case, the issue of limitation was not argued as a core defence at the trial court nor the learned judge dealt with the issue at any length, taking into consideration it is related to winding up proceedings and not one of the modes of execution under the Rules of High Court 2012.

(4) We do not find any merit in this line of argument taking into consideration that there will be no reason on the facts of the case for the court to grant leave to proceed with a winding up proceedings **if at all leave is necessary according to law** as the enforcement of the judgment was delayed in consequence of the representation of the first respondent and subsequently the second respondent who was in cohorts with Amir Hussain and his group inclusive of the common solicitors (emphasis added).

[14] In abundance of caution, we must say that a judgment debtor whether insolvent or solvent can dispose of the judgment debtor's assets to *bona fide* purchasers if there is no restriction in law. A creditor cannot complain that the disposal has affected his rights *per se*. However, when such disposal is

done to attract a complaint of conspiracy as well as tort of 'conspiracy to injure' as in the instant case and on its special facts the court is obliged to grant the relief based on established legal principles which had been dealt with earlier. A useful read to distinguish a wrong and right in this area of jurisprudence is found at pp. 283 and 284 of *Ratanlal & Dhirajlal on 'The Law of Torts'* 21st edn, where the learned authors say:

> The purpose to injure or harm a third party must be distinguished from the purpose to advance the legitimate interests of the persons combining together. In *Mogul Steamship Co.*'s case, it is laid down that no action for a conspiracy lies against persons who act in concert to advance their legitimate interests but as a necessary consequence to damage another and do damage him, but who at the same time merely exercise their own rights by lawful means and who infringe no rights of other people. Thus acts done by X and Y, who are acting in concert, solely for the purpose of protecting and extending their trade and increasing their profits, and which do not involve the employment of any means in themselves unlawful, are not actionable, even though these acts cause damage to A. In other words, trade competition carried out to an extreme length is, even though it causes damage to A, not actionable; provided that his competitors are acting solely with the unlawful object of securing success in trade and use no unlawful means.

[15] For reasons stated above, the appeal is allowed. The first and second respondents are jointly and severally liable to pay damages to the appellant in the sum of RM4,344,571 with interest at 5% per annum from the date of filing of writ until full realisation of the judgment sum, with costs. The first respondent to pay costs of RM30,000 and the second respondent to pay costs of RM50,000 to the appellant. The judgment of the High Court is set aside. Deposit refunded.

We hereby order so.